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No. 15-274

IN THE SUPREME COURT OF THE UNITED STATES

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEP'T OF STATE HEALTH SERVICES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF 24 SCHOLARS OF FEDERALISM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are twenty-four scholars of federalism from an array of disciplines and academic backgrounds. A full list of *amici curiae*, including names and institutional affiliations (listed for identification purposes only), is included in the Appendix to this brief. *Amici* hold a variety of views on abortion rights and the appropriate regulatory response to the recent high-profile scandals in the abortion industry, such as the shocking practices of Dr. Kermit Gosnell. *Amici* are united, however, in viewing the federalist structure of our Nation's government as essential to preserving individual liberty. *Amici* are concerned that Petitioners urge this Court to depart from venerable principles of federalism, long established in this Court's jurisprudence, in the interest of ensuring maximal access to abortion services. In the long run, abandoning principles of federalism will tend to corrode, not enhance, the liberty of individual citizens. Accordingly, *amici* urge this Court to adhere to longstanding principles of federalism and to defer to the State's regulatory authority in its adjudication of this case.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for Petitioners and Respondents have provided counsel for *amici* with their written consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

"[F]ederalism protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). In innumerable cases, this Court has recognized that federalism protects individual liberty, no less than the personal guarantees of the Bill of Rights and the Fourteenth Amendment. In light of its importance, this Court has consistently invoked principles of federalism to define the scope of asserted liberty interests in its substantive due process cases.

I. This Court's cases identify four principles of federalism that are particularly relevant here. All of these principles counsel this Court to reject the facial attacks and uphold the challenged Texas regulations.

A. First, this Court is reluctant to intrude into areas of traditional state concern, including the health-and-safety regulation of medical facilities and the medical profession. It is beyond dispute that "regulation of health and safety is primarily, and historically, a matter of local concern." *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006) (quotation marks and citation omitted). The States' traditional regulatory authority over matters of medicine and public health dates to the Founding. This Court has acknowledged and upheld the States' primacy in this area in dozens of cases since *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The Court's longstanding reluctance to intrude into areas of traditional state concern counsels against invalidation of the Texas regulations, which would tend to "alter the federal-state balance" in "areas traditionally supervised by the States' police power." *Oregon*, 546 U.S. at 274-75.

B. Second, this Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009). In this instance, the States as "laboratories of democracy" are currently devising competing legislative responses to a string of high-profile scandals in the abortion industry. Numerous States, such as Texas, have responded by tightening regulatory oversight of abortion practices, while other States have taken the opposite approach of deregulating abortion. Such competing and conflicting approaches to hotly disputed issues constitute a strength, not a weakness, of our federal system. This Court should not "constitutionalize" in this area, nor should it "take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause." *Dist. Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 56 (2009).

C. Third, this Court prefers judgments that tend to maximize political participation and accountability at the state and local levels. In the States, "the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2578 (2012). Promoting democratic accountability at the state level creates a system of government in which the citizens are close to a responsive government, not controlled by the distant apparatus of federal power. This Court presumes that such state democratic processes are capable of grappling with "difficult and delicate issues" in a decent and humane manner. *Schuette* v.

Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1636 (2014) (plurality opinion). Facially invalidating the Texas regulations, as Petitioners urge, would undermine the state-level democratic participation and accountability favored by this Court's cases.

D. Fourth, this Court defers to state regulation on issues in which the "unchartered area" of substantive due process provides few "guideposts for responsible decisionmaking." *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Health-and-safety regulation of abortion clinics, and medical licensing of abortion professionals, are just such issues for which substantive due process provides few reliable guideposts. Unlike the States, the federal judiciary lacks both the constitutional mandate and the institutional competence to regulate effectively in these areas. By demanding that this Court make quintessentially regulatory determinations about medical licensing and clinic health-and-safety standards, Petitioners would require "this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States"—a role that the Court has long eschewed. *Gonzales* v. *Carhart*, 550 U.S. 124, 164 (2007) (quoting *Webster* v. *Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989) (plurality opinion)).

II. Three additional aspects of Petitioners' argument run afoul of these principles of federalism. Petitioners urge that this Court accord little or no deference to state legislative factfinding. They contend that this Court should draw adverse inferences about state legislative motivations from the putative ill effects of the Texas regulations. And

they call for the broadest possible remedy—facial invalidation of regulations—in the face of this Court's recent and repeated counsel for narrow, as-applied challenges in the abortion context.

A. Principles of federalism call for federal courts to give particular deference to the factual determinations of state legislatures. The Constitution confers on the States "broad latitude" to make factual determinations on disputed issues of medical regulation, including in the abortion context. *Mazurek* v. *Armstrong*, 520 U.S. 968, 973 (1997). "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales* v. *Carhart*, 550 U.S. at 163. Such "broad latitude" and "wide discretion" are particularly appropriate when reviewing state statutes, because the States, not the federal government, have primary and traditional concern in this area.

B. Principles of federalism also counsel against Petitioners' argument that the Court should infer illicit legislative purpose from the putatively restrictive effects of the Texas regulations. In abortion cases, this Court "do[es] not assume unconstitutional legislative intent even when statutes produce harmful results; much less do we assume it when the results are harmless." *Mazurek*, 520 U.S. at 972. Petitioners' claim of improper purpose rings hollow, moreover, in light of the fact that certain Texas regulations, such as the admitting-privileges requirement, were already considered best practices in the abortion industry when they were enacted by the State.

C. Petitioners also urge this Court to violate principles of federalism by adopting the broadest

possible remedy—complete facial invalidation of the challenged regulations—for the putative deficiencies of the Texas regulations. This Court has recently and repeatedly rejected such calls for overbroad, facial remedies in abortion cases. "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales* v. *Carhart*, 550 U.S. at 168. Rather, the Court has reaffirmed its "normal rule . that partial, rather than facial, invalidation is the required course." *Ayotte* v. *Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006). A narrow, as-applied challenge to state regulations would comport with principles of federalism and due deference to the States as coequal sovereigns in our unique federalist system. Petitioners' needlessly broad, facial challenges do not.

ARGUMENT

I. This Court Consistently Invokes Principles of Federalism to Define the Scope of Fundamental Liberties Recognized in its Substantive Due Process Jurisprudence.

From the inception of its substantive due process jurisprudence, this Court has consistently invoked principles of federalism to define the scope and guide the application of asserted fundamental-liberty interests.

"[O]ur federalism" requires the States to be treated as "residuary sovereigns and joint participants in the governance of the Nation." *Alden* v. *Maine*, 527 U.S. 706, 748 (1999). "By 'splitting the

atom of sovereignty,' the Founders established 'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Id.* at 751 (quoting *Saenz* v. *Roe*, 526 U.S. 489, 504 n.17 (1999)).

Critically, federalism protects individual liberty. Federalism arose from the "counterintuitive insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States* v. *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). Principles of federalism are just as essential to securing the individual liberty of citizens as the individual rights guaranteed by the Due Process Clause. "Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2577-78 (2012). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York* v. *United States*, 505 U.S. 144, 181 (1992).

Thus, an interpretation of the Constitution that promotes "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011).

In keeping with these observations, this Court's substantive due process jurisprudence has repeatedly invoked principles of federalism, both when it confronts novel assertions of fundamental liberties

and when it defines the scope of previously recognized liberties. Four such principles of federalism are directly relevant in this case. First, this Court has repeatedly expressed reluctance to intrude into areas of traditional state concern. Second, this Court has respected the role of the States as "laboratories for experimentation" in adopting variable and competing responses to challenging policy questions. Third, this Court has interpreted its own precedents in a manner that maximizes democratic participation and accountability at the state and local level. Fourth, this Court has deferred to state policymaking because of the scarcity of clear guideposts for judicial decisionmaking in the "unchartered" area of substantive due process.

A. This Court Is Reluctant to Intrude into Areas of Traditional State Concern, Such as Health-and-Safety Regulation of the Medical Profession and Medical Facilities.

Principles of federalism counsel this Court to tread carefully before intruding into an area of traditional state regulation. Federalism and separation of powers create "a double security to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)). "Were the Federal Government to take over the regulation of entire areas of traditional state concern the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

"The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Id.* Thus, "[p]reservation of the States as independent and autonomous political entities" is an affirmative value that is better served by "requiring [the States] to make policy in certain fields." *Printz* v. *United States*, 521 U.S. 898, 928 (1997).

It is beyond dispute that the health-and-safety regulation of medicine—including professional licensing requirements and regulation of medical facilities—is an area of traditional state concern. "[T]he field of health care" is "a subject of traditional state regulation." *Pegram* v *Herdrich*, 530 U.S. 211, 237 (2000). "It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine." *Watson* v. *Maryland*, 218 U.S. 173, 176 (1910). "Inspection laws, quarantine laws, health laws of every description are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation." *Gibbons* v *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

The States' traditional regulation of health care dates to the Founding. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 161-62 (describing traditional state regulation against the spread of communicable diseases). "Since colonial times, the regulation of professions has been seen as a state activity in the

United States. Medicine is a particular creature of state regulation because it is the nexus of three traditional areas of police power regulation." Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 ANNALS HEALTH L. 201, 202 (1999). "Despite the enormous expansion of individual rights jurisprudence since the early constitutional period, the United States Supreme Court has not substantially limited the police power as it relates to public health disease control." *Id.* at 205-06.

Indeed, in innumerable cases since the Founding, this Court has recognized and reaffirmed the States' traditional authority to regulate medicine. *See, e.g.*, *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006) (stating that "regulation of health and safety is 'primarily, and historically, a matter of local concern'" (quoting *Hillsborough Cnty.* v. *Automated Med. Labs.*, 471 U.S. 707, 719 (1985))); *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (noting that health care is among the "fields of traditional state regulation"); *Whalen* v. *Roe*, 429 U.S. 589, 603 n.30 (1977) ("It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions."); *Bigelow* v. *Virginia*, 421 U.S. 809, 827 (1975) ("The State, of course, has a legitimate interest in maintaining the quality of medical care provided within its borders."); *Goldfarb* v. *Va. State Bar*, 421 U.S. 773, 792 (1975) ("[T]he States have a compelling interest in the practice of professions within their boundaries, and broad power to establish standards for licensing

practitioners and regulating the practice of professions."); *Barsky* v. *Bd. of Regents*, 347 U.S. 442, 451 (1954) (holding that the practice of medicine is "a privilege granted by the State under its substantially plenary power to fix the terms of admission" and that "a state's legitimate concern for maintaining high standards of professional conduct [in medicine] extends beyond initial licensing"); *Minnesota ex rel. Whipple* v. *Martinson*, 256 U.S. 41, 45 (1921) ("The right to exercise this power [to regulate health and safety] is so manifest in the interest of the public health and welfare, that it is too firmly established to be successfully called in question."); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 38 (1905) ("The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government."); *Reetz* v. *Michigan*, 188 U.S. 505, 506 (1903) ("The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question."); *Dent* v. *West Virginia*, 129 U.S. 114, 122 (1889) ("Few professions require more careful preparation by one who seeks to enter it than that of medicine."); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) at 203.

This Court's historical deference to state regulation in areas of traditional state concern counsels against any constitutional ruling that would disrupt the traditional federal-state balance in this area. By analogy, in *Gonzales* v. *Oregon*, this Court rejected a broad construction of the federal Controlled Substances Act that would have permitted the federal

Attorney General to override state-level policies about the administration of drugs for assisted suicide. This Court stated that "the background principles of our federal system belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Gonzales* v. *Oregon*, 546 U.S. at 274. "The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it." *Id.* at 275. Such "background principles of our federal system" are equally relevant in this case, and they again counsel against "alter[ing] the federal-state balance" by imposing the federal judiciary's regulation in an "area[] traditionally supervised by the States' police power." *Id.* at 274-75.

B. This Court Respects the Role of States as "Laboratories of Democracy" in Devising Competing Solutions to Emergent Problems of Health Care Regulation.

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009). "The federal structure permits 'innovation and experimentation' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 131 S. Ct. at 2364 (quoting *Gregory*, 501 U.S. at 458). When "States are presently undertaking extensive and serious evaluation" of disputed social issues, "the challenging task of crafting appropriate procedures for safeguarding liberty interests is entrusted to the 'laboratory' of the States in the first instance."

Washington v. *Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring) (quoting *Cruzan* v. *Dir., Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)). "[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

This recognition of the States' function as laboratories of democracy has played a central role in this Court's substantive due process cases. For example, in *District Attorney's Office of the Third Judicial District* v. *Osborne*, this Court refused to "constitutionalize" an issue of traditional state regulation, namely the administration of state criminal justice in light of the emerging technology of DNA forensics, where States were experimenting with various policy solutions. 557 U.S. 52, 56 (2009). "The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response." *Osborne*, 557 U.S. at 72-73.

Similarly, in *Glucksberg*, this Court declined to intrude on the States' freedom to regulate assisted suicide, in large part because "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues." *Glucksberg*, 521 U.S. at 719. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue,

as it should in a democratic society." *Id.* at 735; *see also id.* at 737 (O'Connor, J., concurring).

Likewise, in *Cruzan*, the States demonstrated "both similarity and diversity in their approaches to decision of what all agree is a perplexing question" regarding the withdrawal of life-saving medical treatment from an incompetent patient. *Cruzan*, 497 U.S. at 277. This Court refused to "prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment," given that "no national consensus ha[d] yet emerged on the best solution for th[at] difficult and sensitive problem." *Id.* at 292 (O'Connor, J., concurring).

This case likewise considers the response of one State to a "difficult and sensitive problem," *id.*—namely, the "shocking revelation of terrible conditions and procedures at an abortion clinic that received nationwide attention," in the horrifying abortion practices of Dr. Kermit Gosnell. *Planned Parenthood of Wis.* v. *Van Hollen*, 738 F.3d 786, 802 (7th Cir. 2013) (Manion, J., concurring in part and concurring in the judgment). Moreover, the Gosnell scandal arose as part of a long series of similar revelations of appalling practices in the unregulated shadows of the abortion industry, involving "numerous other examples of egregious and substandard care by abortion providers and clinics." *Id.* at 803; *see also id.* at 807-10, Appendix to the Concurrence (citing news reports of abuses and fatalities by 26 abortion practitioners nationwide).

These scandals have provoked varying and competing responses in the States, and "no national consensus has yet emerged on the best solution for this difficult and sensitive problem." *Cruzan*, 497

U.S. at 292 (O'Connor, J., concurring). Texas, along with numerous other States, has responded by tightening its regulation of abortion providers to forestall the regulatory laxity that contributed to the Gosnell horrors in Pennsylvania. *See* Report of the Grand Jury, *In re County Investigating Grand Jury XXIII*, at 8-13, 16-17, 137-217, 247-61 (2011) (detailing the "complete regulatory collapse" that enabled Gosnell's conduct and recommending regulatory reforms in response), *available at* http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf.[2] Texas's approach mirrors that of a substantial bloc of States, many of which were similarly responding to the Gosnell scandal. *See, e.g.*, Ohio Rev. Code Ann. § 3702.3010 (enacted in 2015) (requiring abortion providers to have admitting privileges at a hospital within 30 miles); Tenn. Code Ann. § 68-11-201(3) (enacted in 2015) (redefining "ambulatory surgical treatment center" to include facilities providing surgical abortions); La. Stat. Ann. § 40:1061.10(A)(2)(a) (enacted in 2014) (requiring abortion providers to have admitting privileges at a hospital within 30 miles); Wis. Stat. § 253.095(2) (enacted in 2013) (requiring abortion providers to have admitting privileges at a hospital within 30 miles); S.B. 353, Gen. Assem. Sess. 2013, Part IV, § 4(c) (N.C. 2013) (authorizing the North Carolina Department of Health and Human Services "to apply any requirement for the licensure of ambulatory surgical centers" to abortion clinics); Ala. Code § 26–23E (enacted in 2013) (requiring abortion providers to have staff privileges at a hospital "within the same standard metropolitan statistical area" and

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[2] All internet sources were last visited on February 1, 2016.

classifying abortion clinics as "ambulatory health care occupanc[ies]"); N.D. Cent. Code § 14–02.1–04(1) (enacted in 2013) (requiring abortion providers to have admitting privileges within 30 miles); Miss. Code § 41–75–1(f) (enacted in 2012) (requiring abortion providers to have admitting privileges "at a local hospital"); Tenn. Code Ann. § 39–15–202(j)(1) (enacted in 2012) (requiring abortion providers to have admitting privileges at a hospital in the same or an adjacent county); Ariz. Rev. Stat. § 36–449.03(C)(3) (enacted in 2012) (requiring all abortion providers to have admitting privileges at a hospital and further requiring providers of surgical abortions to have such privileges at a hospital within 30 miles); Kan. Stat. Ann. § 65-4a08(b) (enacted in 2011) (requiring abortion providers to have "clinical privileges" at a hospital within 30 miles). *See also* Ark. Code Ann. § 20–16–1504(d) (enacted in 2015) (requiring providers of medication abortions to contract with physicians who have admitting privileges); Okla. Stat. Ann. § 63–1–748 (enacted in 2014) (requiring a physician with admitting privileges at a hospital within 30 miles to "remain on the premises until all abortion patients are stable and ready to leave the recovery room"); Ind. Code § 16–34–2–4.5 (enacted in 2011) (requiring abortion providers to have admitting privileges at a hospital within the same county or an agreement with a physician who has such privileges); Kan. Stat. § 65–4a09(d)(3) (enacted in 2011) (requiring that a physician with admitting privileges within 30 miles "is available"); Fla. Stat. § 390.012(3)(c)(1) (enacted in 2005) (requiring that an abortion clinic designate a medical director with admitting privileges at a Florida hospital or a "transfer agreement with a

licensed hospital within reasonable proximity of the clinic"); Mo. Rev. Stat. § 188.080 (enacted in 2005) (requiring abortion providers to have admitting privileges within 30 miles); Ariz. Rev. Stat. § 36-449.02(A) (enacted in 1999) (requiring abortion clinics to meet the same licensure requirements as "health care institutions"); Utah Admin. Code R432–600–13(2)(a) (enacted in 1998) (requiring an abortion facility to have a transfer agreement with a hospital within 15 minutes' travel time providing "admitting privileges for the clinic medical director or the attending physician").

By contrast, other States have reacted to these crises by accelerating their *deregulation* of the abortion industry. "In general, the West Coast is trending toward decentralizing abortion and making it as widely available as possible. Oregon has no abortion restrictions and Washington is now requiring all public hospitals to perform abortions." Amanda Marcotte, *Blue States Buck the Abortion Trend*, THE DAILY BEAST (August 29, 2013), *at* http://www.thedailybeast.com/witw/articles/2013/08/29/blue-states-get-creative-in-expanding-abortion-access.html. *See, e.g.*, Cal. Bus. & Prof. Code § 2253 (enacted in 2013) (authorizing specially-trained nurse practitioners, nurse-midwifes, and physician assistants to perform certain first-trimester abortions); Op. Att'y Gen. No. 3 (Wash. 2013) (requiring public hospitals that provide maternity services to provide "substantially equivalent" abortion services).

Thus, on opposing sides of this issue, the "States are presently undertaking extensive and serious evaluation" of the appropriate response to these abortion-regulation scandals, and "the challenging

task of crafting appropriate procedures for safeguarding . liberty interests is entrusted to the 'laboratory' of the States in the first instance." *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring) (quoting *Cruzan*, 497 U.S. at 292 (O'Connor, J., concurring)). Principles of federalism urge this Court to permit this state-level experimentation to continue.

C. This Court Applies Substantive Due Process Principles to Enable Democratic Participation and Accountability at the State Level.

As a closely related principle, this Court's cases emphasize the importance of promoting democratic participation and accountability at the state level as a means of protecting individual liberty. As this Court has stated, because they are reserved for the States, "the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2578. "The Framers ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." *Id.* (quoting THE FEDERALIST NO. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961)).

"The federal structure allows local policies 'more sensitive to the needs of a heterogeneous society' [and] enables greater citizen 'involvement in democratic processes' " *Bond*, 131 S. Ct. at 2364 (quoting *Gregory*, 501 U.S. at 458). "Federalism allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice

in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.*

Numerous benefits flow from the preservation of democratic participation and accountability at the state and local level. "Accountability is diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate." *New York* v. *United States*, 505 U.S. at 169. "In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). "If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems." *Id.* at 790.

For these reasons, this Court does not lightly presume that state policymaking affecting fundamental liberty interests "is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by [the federal judiciary], acting at some remove from immediate public scrutiny and control." *Schuette* v. *Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality opinion). Rather, this Court recognizes that democratic majorities are capable of grappling with "difficult and delicate issues." *Id.* at 1636. "[T]he Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates " *Id.* at 1649 (Breyer, J., concurring in the judgment). "Preserving our federal system ensures that essential choices

can be made by a government more proximate to the people than the vast apparatus of federal power." *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 684-85 (1999) (Kennedy, J., dissenting).

This case directly implicates this well-recognized principle of federalism. The enactment of Texas's regulations was marked by a high degree of public attention and participation in the state political process, and it triggered similar political participation in other States on both sides of these issues. *See Protesters Face Off at Texas Capitol Over Abortion Bill*, DALLAS MORNING NEWS (July 1, 2013), *available at* http://www.dallasnews.com/news/politics/headlines/20130701-abortion-demonstrators-arriving-early-for-texas-capitol-rally.ece (noting that a rally regarding the proposed abortion clinic regulations "was the largest seen in Austin for years"); Katey Psencik, *Students Participate in Texas Abortion Debate*, USA TODAY, July 3, 2013, *available at* http://college.usatoday.com/2013/07/03/students-participate-in-texas-abortion-debate/ (describing the involvement of college students in the debate over Texas's abortion clinic regulations); Grace Wyler, *Activists Are Using The Kermit Gosnell Murder Trial To Push A Whole Slew Of Abortion Restrictions*, BUSINESS INSIDER, April 17, 2013, *at* http://www.businessinsider.com/kermit-gosnell-pro-life-anti-abortion-laws-2013-4 (discussing the wave of state legislative activity in response to Kermit Gosnell's atrocities). The invalidation of Texas's regulations would render this political participation effectively futile, thus undermining both democratic accountability and participation in the States.

D. Federalism Calls for Deference to State Regulations Because the "Unchartered" Area of Substantive Due Process Contains No Clear Guideposts for Federal-Court Intervention.

This Court acts with "the utmost care" in its application of substantive due process principles because this area of law is literally "unchartered," *i.e.*, ungoverned by any constitutional text. *Glucksberg*, 521 U.S. at 720 (quoting *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992)). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125; *see also Osborne*, 557 U.S. at 72 (same). "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins*, 503 U.S. at 125.

Because of the scanty guidance for "responsible decisionmaking" in this area, *id.*, this Court prefers not to "take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause." *Osborne*, 557 U.S. at 56. "The elected governments of the States" are best equipped to navigate such "unchartered area[s]," and the federal judiciary should not "place the matter outside the arena of public debate and legislative action." *Id.* at 72-73 (quoting, in part, *Glucksberg*, 521 U.S. at 720); *see also id.* at 73 n.4 (rejecting a substantive due process claim on the grounds that it

would "thrust the Federal Judiciary into an area previously left to state courts and legislatures").

Needless to say, judicial decisionmaking in the absence of clear and reliable guideposts "creates too great a risk that the Court is exercising its own 'WILL instead of JUDGMENT,' with the consequence of 'substituting its own pleasure to that of the legislative body.'" *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in the judgment) (square brackets omitted) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

In this case, Petitioners call for this Court to make specific, policy-laden determinations in an area that is quintessentially "unchartered." *Collins*, 503 U.S. at 125. It is axiomatic that "the Constitution simply says nothing, clear or fuzzy, about abortion." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 927 (1973). Petitioners ask this Court to determine, in effect, how many miles are too far to have to travel for an abortion, how well ventilated abortion clinics must be, what specific licensing requirements should apply to abortion providers, and many other similar issues. The federal judiciary lacks both the constitutional mandate and the institutional competence to scrutinize these issues. By drawing lines and making policy choices in this area—on quintessentially regulatory subjects such as what licensing requirements are appropriate for physicians and what safety standards are appropriate for health clinics—this Court would depart from its traditional role with few or no objective guideposts.

As this Court has noted, the trimester framework of *Roe* has been criticized because it "left this Court to

serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Gonzales* v. *Carhart*, 550 U.S. 124, 164 (2007) (quoting *Webster* v. *Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989) (plurality opinion)). This case likewise threatens to make this Court "the country's *ex officio* medical board." *Id.* Principles of federalism, therefore, counsel the Court to defer to state democratic processes to resolve disputes in this "unchartered" territory.

II. Petitioners Violate Principles of Federalism by Rejecting State Legislative Factfinding, Drawing Negative Inferences About State Legislative Motivations, and Seeking the Overbroad Remedy of Facial Invalidation.

Petitioners' arguments in this case call for this Court to violate these long-recognized principles of federalism in several discrete ways. Most notably, Petitioners run afoul of well-established principles of federalism by calling for little or no deference to state legislative factfinding, by drawing adverse inferences about the motivations of the state legislature, and by calling for the overbroad remedy of facial invalidation of the Texas regulations.

A. Federalism Calls For Deference to the State's Legislative Factfinding on Disputed Issues of Patient Health and Safety.

Petitioners' principal contention is that this Court should disregard and overrule the legislative factfinding in relation to disputed issues of health and

safety on which the Texas regulations are based. *See, e.g.*, Brief of Petitioners ("Pet. Br.") at 47 (arguing that judicial deference to Texas's legislative factfinding constitutes an "utter abdication of [the federal courts'] constitutional obligation"). By opposing deferential review of state legislative factfinding, Petitioners contradict this Court's cases and run afoul of several well-established principles of federalism. Judicial deference to state legislative factfinding preserves the State's traditional role as policymakers in this area, respects the ability of States to serve as laboratories for experimentation, promotes democratic participation and accountability in the state legislative process, and reflects this Court's limited ability to regulate effectively in the absence of clear judicial guideposts. *See supra* Part I.A-D.

For these reasons, in the abortion context, this Court defers to legislative factfinding on disputed issues relating to medical health and safety. "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales* v. *Carhart*, 550 U.S. at 163 (citing *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n. 3 (1997); *Jones* v. *United States*, 463 U.S. 354, 364–65 n. 13, 370 (1983); *Lambert* v. *Yellowley*, 272 U.S. 581, 597 (1926); *Collins* v. *Texas*, 223 U.S. 288, 297–98 (1912); *Jacobson*, 197 U.S. at 30–31; *Stenberg* v. *Carhart*, 530 U.S. 914, 969–72 (2000) (Kennedy, J., dissenting); and *Marshall* v. *United States*, 414 U.S. 417, 427 (1974)). "When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad." *Marshall*, 414 U.S. at 427.

Deferring to Congress's factfinding in *Gonzales v. Carhart*, this Court held that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." 550 U.S. at 164. "The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Id.* (citation omitted); *see also id.* at 161-164 (deferring to the legislature's factual findings where "both sides have medical support for their position").

Similarly, in *Mazurek* v. *Armstrong*, 520 U.S. 968 (1997), this Court held that *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), requires a deferential approach to legislative determinations about medical licensing and patient safety in the abortion context: "In the course of upholding the physician-only requirement at issue in [*Casey*], we emphasized that '[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*'" *Mazurek*, 520 U.S. at 973 (quoting *Casey*, 505 U.S. at 885 (plurality opinion)) (emphasis added by the *Mazurek* Court). The level of deference established in *Mazurek* was quite high, as this Court deferred to the state legislature's determinations even in the face of the challengers' assertion that "all health evidence contradicts the claim that there is any health basis for the law." *Gonzales* v. *Carhart*, 550 U.S. at 164 (quoting *Mazurek*, 520 U.S. at 973)).

Moreover, the reasons for deference to legislative

factfinding are even stronger in this case than in *Gonzales* v. *Carhart*, which involved factual determinations made by the U.S. Congress. *See id.* at 141 (describing congressional factfinding in support of the federal Partial-Birth Abortion Ban Act). Deference to Congress's factfinding comports with the horizontal separation of powers, while deference to factfinding by state legislatures advances principles of vertical federalism as well. Medicine and the health professions are a traditional enclave of regulation by the States, not Congress; the States, not Congress, serve as laboratories for experimentation on hotly disputed issues; and democratic accountability and participation occur more naturally in the state governments, which are closer to the people. *See supra* Part I.A-C. Accordingly, the reasons for deference to the State's legislative determinations are even stronger in this case than the reasons for deference to the U.S. Congress in *Gonzales* v. *Carhart*.

B. Contrary to Petitioners' Argument, this Court Should Not Infer That the State Legislature Acted with an Impermissible Purpose.

Petitioners repeatedly argue that this Court should infer an impermissible legislative purpose from the putative ill effects of the Texas regulations, urging that the regulations are "nothing more than a pretext for restricting access to abortion," and "a sham." Pet. Br. at 31, 38; *see also id.* at 2, 34-44. This argument also runs afoul of federalism principles.

Recognizing the injuries to federalism inflicted when federal courts impute illicit motives to state legislatures, this Court has refused to draw such

inferences in the abortion context. As this Court stated in *Mazurek*, "[w]e do not assume unconstitutional legislative intent even when statutes produce harmful results; much less do we assume it when the results are harmless." *Mazurek*, 520 U.S. at 974 (per curiam) (citation omitted) (citing *Washington* v. *Davis*, 426 U.S. 229, 246 (1976)).

The holding of *Mazurek* on this point accords with a long line of cases in which this Court has declined to impute an unconstitutional motivations to state legislatures. "[T]his Court has a long tradition of refraining from such inquiries" into the "subjective motivation of the *lawmakers*." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) (citing *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130–31 (1810) (Marshall, C.J.), and *United States* v. *O'Brien*, 391 U.S. 367, 383–84 (1968)). "[T]his Court has consistently held that it is not for us to invalidate a statute because of our views that the 'motives' behind its passage were improper; it is simply too difficult to determine what those motives were." *Epperson* v. *Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring); *see also Palmer* v. *Thompson*, 403 U.S. 217, 224–25 (1971). Deference to state legislatures as coequal sovereigns in our federalist system militates against lightly inferring an impermissible purpose from putative adverse effects, as Petitioners propose.

Moreover, Petitioners' argument that the State is guilty of "pretext" rings particularly hollow here. Petitioners here contend that "hospital admitting privileges are not a reliable indicator of a physician's professional competence." Pet. Br. at 20 (citing anecdotal evidence). In 2000, however, "the National

Abortion Federation specifically recommended that '[i]n the case of emergency, the doctor should be able to admit patients to a nearby hospital (no more than 20 minutes away).'" *Van Hollen*, 738 F.3d at 801 (Manion, J., concurring in part and concurring in the judgment) (quoting National Abortion Federation, HAVING AN ABORTION? YOUR GUIDE TO GOOD CARE (2000)). Again, "[i]n 2003, the American College of Surgeons issued a statement on patient-safety principles that reflected a consensus of the surgical community . Core Principle #4 provides that '[p]hysicians performing office-based surgery must have admitting privileges at a nearby hospital, [or] a transfer agreement " *Id.* at 800-01. In other words, the admitting-privileges requirement merely enacted standards that were already considered best practices by abortion providers and medical authorities. In light of such pre-litigation professional standards, it is Petitioners' litigation position—not the State's—that bears the stamp of "pretext."

C. This Court Should Reject Petitioners' Overbroad Facial Attack on the Texas Regulations.

In general, when reviewing state statutes, this Court invalidates as narrowly as possible and severs invalid applications whenever possible. Ordinarily, "[a] facial challenge to a legislative Act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Moreover, in cases where partial invalidity is

identified, "[t]he statute may be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).

Addressing a claim of invalidity of a state statute on a narrow, as-applied basis plainly advances fundamental principles of federalism. By leaving state enactments intact to the greatest extent possible, this Court preserves the States' traditional authority over health-care regulation as far as possible; it promotes legislative experimentation by leaving state enactments intact; and it encourages democratic participation and accountability in the state legislative process. *See supra* Part I.A-C.

In keeping with such principles, this Court has recently emphasized that federal courts should review abortion regulations on a narrow, as-applied basis. First, in *Ayotte* v. *Planned Parenthood of Northern New England*, this Court unanimously reversed a lower court's ruling that had facially invalidated a parental-notification statute for lack of health exception. 546 U.S. 320, 331 (2006). In so holding, this Court emphasized that "we try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people," and that "[i]t is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." *Id.* at 329 (citations and alterations omitted). "Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* (quotation marks and alterations omitted).

Again, considering a facial challenge in *Gonzales* v. *Carhart*, this Court reaffirmed that "[b]road challenges of this type impose 'a heavy burden' upon the parties maintaining the suit." 550 U.S. at 167 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991)). "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Id.* at 168. "The Act is open to a proper as-applied challenge in a discrete case." *Id.*

In this case, Petitioners urge this Court to facially invalidate the Texas regulations—even as applied, for example, to doctors who practice in metropolitan centers with no shortage of providers, or to clinics operating nearby the clinics that already satisfy the ambulatory-surgical-center requirements. *See* Pet. Br. at 54 ("Statewide invalidation of the requirements is the appropriate remedy."). This argument contradicts this Court's holdings in *Ayotte* and *Gonzales* v. *Carhart*, and it flies in the face of principles of federalism. As this Court has recognized, "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales* v. *Carhart*, 550 U.S. at 168 (square brackets omitted) (quoting Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000)).

In light of these principles of federalism, the federal courts should entertain true as-applied challenges to the Texas regulations, rather than the "broad, facial attack" launched by Petitioners. *Gonzales* v. *Carhart*, 550 U.S. at 133. For example, the courts should consider the admitting-privileges requirement strictly on a doctor-by-doctor basis,

considering whether the application of the requirement to each individual doctor would pose an undue burden on that doctor's patients. To the extent that a court considers the aggregate effect of the admitting-privileges requirement, moreover, it should do so only in the context of an individual doctor's challenge. "In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack." *Id.* at 167.

Likewise, any challenges to the ASC requirements should be considered only on an as-applied basis. This entails considering challenges by individual clinics on a case-by-case basis, and requiring each clinic to bring an as-applied challenge to each specific regulation to which it objects. To the extent that each clinic believes that the aggregate effect on other clinics is relevant to its determination, such arguments should be presented in the context of an as-applied challenge by an individual clinic. Where "[t]he Act does not on its face impose a substantial obstacle," this Court should "reject this further facial challenge to its validity." *Id.* at 156.

CONCLUSION

For the reasons stated, *amici curiae* respectfully request that this Court affirm the judgment of the U.S. Court of Appeals for the Fifth Circuit.

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APPENDIX

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